

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

INVESTIGATION BY THE DEPARTMENT OF)
TELECOMMUNICATIONS AND ENERGY ON ITS)
OWN MOTION INTO FITCHBURG GAS AND) D.T.E. 03-9
ELECTRIC LIGHT COMPANY'S DEALINGS WITH)
ENERMETRIX, INC.)

INITIAL BRIEF OF
FITCHBURG GAS AND ELECTRIC LIGHT COMPANY

June 26, 2003

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I. INTRODUCTION

Fitchburg Gas and Electric Light Company ("FG&E" or the "Company") hereby submits to the Department of Telecommunications and Energy (the "Department") its initial brief addressing the Department's investigation into FG&E's transactions with Enermetrix, Inc. ("Enermetrix") between 2001 and 2002. This investigation results from allegations made by the Attorney General in its brief in FG&E's last rate case, asserting that Enermetrix was an affiliate of FG&E and that FG&E improperly used Enermetrix to acquire default service wholesale supplies for its customers. D.T.E. 02-24/25, AG Initial Brief, pp. 78-79. The transactions in question occurred in September 2001 and March 2002, when FG&E arranged for Enermetrix to broker its default service supplies, the results of which were subsequently approved by the Department.

The statutory analysis and the record evidence show that Enermetrix was not an affiliate of FG&E under Massachusetts law and regulations during the 2001 and 2002 default service solicitations, and thus no violation of Massachusetts law occurred. The evidence demonstrates that Unitil held a minority non-controlling interest in Enermetrix during the period in question. There is no evidence that Unitil had any power or authority to direct the policies of Enermetrix or to influence the decisions of the Enermetrix Board at any time during its ownership of Enermetrix, and in particular during the relevant period. There is no evidence that FG&E was influenced by a Unitil or Usource employee to use the services of Enermetrix for the 2001 and 2002 solicitations. There is no evidence to suggest that Unitil received any financial benefit, either directly or through its subsidiary Usource, from FG&E's transactions with Enermentrix.

The evidence shows that FG&E's transactions with Enermetrix produced positive results for FG&E's customers. The evidence demonstrates that the results of the 2001 and 2002 RFPs

conducted by Enermetrix were superior to FG&E's prior solicitations. The evidence demonstrates that the suppliers, not FG&E, paid Enermetrix for its services, and that the \$19,000 that Enermetrix received as total fees for both RFPs were reasonable and market-based. The clearest evidence of the benefits of FG&E's dealings with Enermetrix is the fact FG&E's Default Service rates following the 2001 and 2002 solicitations resulted in the lowest or among the lowest prices in the Commonwealth, with savings to FG&E's customers of approximately \$900,000.

Accordingly, the Department should conclude that FG&E did not violate G.L. c. 164, §85 by using the services of Enermetrix in 2001 and 2002.

II. BACKGROUND

A. Procedural History

The Department opened this proceeding on March 21, 2003 to conduct an inquiry into:

1. Whether Enermetrix is a company affiliated to [FG&E] within the meaning of G.L. c. 164, §85 and 220 CMR §12.02.
2. If Enermetrix is an affiliated company, whether [FG&E] complied with the requirements of G.L. c. 164, §85A and 94B pertaining to contracts with affiliated companies.
3. If Enermetrix is an affiliated company, whether the pricing of its services to [FG&E] complied with the requirements of 220 CMR 12.04 pertaining to the pricing of transactions between a distribution company and an affiliated company.
4. If Enermetrix is an affiliated company, whether [FG&E] in procuring its default service supply through Enermetrix obtained a market-based price for default service procured through reasonable business practices in compliance with the Department's directives in D.T.E. 90-60-A.
5. If [FG&E] is found to be in violation of the requirements concerning dealings with an affiliated company or the requirements for the pricing and procurement of default service, what penalty, if any, should be imposed.

In response to the Departments request for comments, FG&E filed its initial comments addressing each of the above issues on April 18, 2003. The Attorney General, the only intervenor in the proceeding, did not file comments. The Department conducted a public hearing on April 24, 2003 and established a procedural schedule. Between April 22 and May 30, 2003, FG&E responded to the Department's and the Attorney General's information requests. On May 9, 2003, FG&E submitted the prefiled testimony of Laurence M. Brock and David K. Foote. Mr. Brock's testimony addresses Unitil's investment in Enermetrix and Mr. Foote's testimony addresses FG&E's use of Enermetrix to solicit suppliers for default service in 2001 and 2002. The Department held an evidentiary hearing on June 11, 2003. On June 18, 2003, FG&E filed its responses to record requests issued during the hearing. The Parties' initial briefs are due by June 26, 2003, and reply briefs are due by July 3, 2003.

B. Unitil's Investment in Enermetrix

1. Description of the Unitil Companies

Unitil Corporation ("Unitil") is a registered public utility holding company under the Public Utility Holding Company Act of 1935, as amended ("PUHCA"). Exh. FGE-1 at 3; Tr. 6/11/03 at 15 (Brock). Unitil owned a small equity stake in Enermetrix during the period under investigation in this proceeding. Id. Unitil directly owns two distribution companies: FG&E in Massachusetts, and Unitil Energy Systems, Inc. ("UES"), which was formed in 2002 as a result of the merger of Exeter & Hampton Electric Company ("E&H") into Concord Electric Company ("CECo"). Id. Unitil also owns Unitil Power Corp., a wholesale power company that provided all-requirements power supply to CEC Co and E&H from 1986 to 2002 and to UES until April 30, 2003. See id. Other Unitil subsidiaries include: Unitil Realty, which owns certain real estate used by Unitil; Unitil Service Corp. ("USC"), a service company that provides management and administrative services to other Unitil affiliates at cost; and Unitil Resources, Inc. ("URI"),

which directly or through its subsidiary Usource, provides energy brokerage and other services on a competitive basis. Exh. FGE-1 at 3. Neither Usource nor URI conducts any business with FG&E. Tr. 6/11/03 at 15-16 (Brock). Usource never owned any equity interest in Enermetrix but since 1998 has licensed a buy-side seat to use the Enermetrix retail energy exchange technology. Id. at 16.

Since the formation of Unitil in 1984 and the merger with FG&E in 1992, Unitil has centralized through USC many of the utility operating functions, in conformance with the guidelines of the Securities and Exchange Commission ("SEC"). Exh. FGE-1 at 3-4. The functions that have been consolidated include: customer service, regulatory, finance and accounting, engineering and operations, energy services, technology services and administration and management services. Id. In 1998, Unitil and FG&E requested, and the Department granted, an exemption under 220 CMR 12.03(17) to allow both FG&E and URI to use the services of USC, provided that URI does not do business in FG&E's service territory.

2. Description of Enermetrix

Enermetrix was started as North American Power Brokers ("NAP"), by two individuals in 1995. Exh. FGE-1 at 4; Tr. 6/11/03 at 16-17 (Brock). Headquartered in Maynard, Massachusetts, NAP initially provided energy brokering in the deregulated energy markets, primarily for natural gas procurement in New York. Id. NAP was a closely held, privately owned company that changed its name to Enermetrix in 1999 to reflect its focus on Internet technology. Id. At that time, the primary business of Enermetrix was operating the Retail Energy Exchange, ("REX" or the "Exchange"), which is an internet-based marketplace for the execution of competitive energy contracts between energy consumers and sellers. Id. at 17.

In 2001, market participants in more than 85 local distribution company service territories in Massachusetts and 26 other states were using the Enermetrix Exchange. Exh. FGE-

1 at 5. At the hearing, Mr. Brock described how the Enermetrix Exchange operated. Tr. 6/11/03 at 17-18 (Brock). The Exchange had three types of entities operating on it: "buying members" who represented energy consumers, "selling members" who bid to supply energy to the consumers and the "Exchange Manager" who administered the rules of the Exchange and the settlement of transaction fees among parties. Id. Buying members posted orders for energy on the Exchange, selling members bid to fill those orders, and the winning bidder paid a fee to the Exchange Manager who shared the fee with the Buying member who posted the order. Id. at 17. Enermetrix was the Exchange Manager. Enermetrix was also one of the buying members of the Exchange that posted orders for its own clients, in this case FG&E. Id. at 18. As Mr. Foote testified, Enermetrix, as a buying member, brokered two solicitations, one in 2001 and the other in 2002 for Fitchburg's default service. The total cost of the supply was \$3.8 million and Enermetrix earned a total fee of \$19,000 from the two energy suppliers that won the bids. Tr. 6/11/03 at 29 (Foote).

3. Unitil's Equity Interest in Enermetrix

At the time FG&E used Enermetrix to assist with its default service solicitations, Unitil Corp. was one of approximately 30 investors in Enermetrix and held an 8.68% equity interest in Enermetrix.¹ Exh. FGE-1 at 5; Tr. 6/11/03 at 21 (Brock). Unitil's Chairman served on the Enermetrix Board as one of 10 directors during the relevant period. Exh. FGE-1 at 6.² At no time did Unitil Corp. own a controlling interest in Enermetrix nor was Unitil Corp. ever in a

¹ Equity owners with more than a 10 percent interest in Enermetrix included Dusquesne Enterprises, Insight Capital Partners III, L.P., John Gaus, Jeff DeWeese, and the Enermetrix Employee Stock Option Plan. Other investors were G.E. Capital Equity Investments, Cinergy Ventures, L.L.C., and Aliant Energy Resources. Exh. FGE-2C.

² In 1999, before the transactions at issue in this case, James Daly, then a Senior Vice President of Unitil, also served on the Board. Id. After December 2000, until Unitil sold its interest in Enermetrix in April 2002, Unitil held only one (Mr. Schoenberger's) out of 10 board seats. Id.

position to exercise significant influence over the policies or decision making at Enermetrix. Tr. 6/11/03 at 23 (Brock).

In early April, 2002, Enermetrix was acquired by CES International, and moved its operations to Atlanta, Georgia. See Exh. FGE-3 at 7; Tr. 6/11/03 at 31 (Foote). As part of this reorganization, Enermetrix significantly curtailed its operations in New England, including terminating the supplier member support group, and was no longer a viable alternative for soliciting default service supplies in New England. Id. Just prior to the merger of Enermetrix with CES, Unitil Corp. and others sold their investment in Enermetrix back to Enermetrix. See Tr. 6/11/03 at 22 (Brock).

4. FG&E's Use of Enermetrix

In the fall of 2000, and the spring of 2001, USC developed RFPs for FG&E's default service supplies. Exh. FGE-3 at 3-4. Tr. 6/11/03 at 109 (Foote). The RFPs were distributed to all companies on the NEPOOL Markets Committee distribution list and to companies on a list maintained by FG&E. Id. These two solicitations produced only three bids. Id. No bidder offered class differentiated pricing, although the RFPs had identified two separate customer groups. Id. at 4.

In 2001, FG&E determined that Enermetrix could provide a more effective means of accessing the competitive energy market to acquire default service supplies than the RFP process previously used by FG&E. Exh. FGE-3 at 4; Tr. 6/11/03 at 26-27 (Foote). Because of the small size of FG&E's default load, a major challenge for FG&E was to attract the market's attention to ensure an efficient and competitive solicitation process. Tr. 6/11/03 at 26 (Foote). FG&E knew that Enermetrix provided a vehicle to access a broad universe of suppliers that participated in both the wholesale and retail electric supply markets and that had experience with load-following customers of similar or even larger size than FG&E's Default Service load. Id.

Enermetrix had extensive contacts with wholesale and retail suppliers, which FG&E believed would assist FG&E in publicizing its solicitation and attracting a robust market response. Id. While FG&E also had relationships and contacts with wholesale power suppliers and traders, these suppliers were oriented to selling defined blocks of power rather than load-following service. Id.; Tr. 6/11/03 at 112 (Foote). The load-following character of Default Service was much more like the retail customer loads provided by the sellers operating on the Enermetrix Exchange. Id.

FG&E contacted Enermetrix during the summer of 2001 and expressed an interest in using Enermetrix for its Fall 2001 Default Service solicitation. Exh. FGE-3 at 5; Tr. 6/11/03 at 27 (Foote). Enermetrix confirmed they had supplier contacts that they used for retail customers that were comparable and larger than the Default Service load for which FG&E was seeking service. Id. FG&E and Enermetrix worked out a process whereby Enermetrix would be the primary contact for prospective bidders and FG&E would provide support for detailed questions from prospective bidders. Id. Thereafter, Enermetrix actively publicized the Default Service RFP and interacted with their contacts to encourage a robust response. Id. at 28.

FG&E had no payment responsibilities to Enermetrix, although FG&E expected that suppliers would factor in the cost in the bid responses. Exh. FGE-3 at 5. Enermetrix charged the successful suppliers approximately \$7,500 for the 2001 solicitation, and \$11,000 for the 2002 solicitation, i.e., a total of approximately \$19,000. Tr. 6/11/03 at 28-29 (Foote). In contrast, the default service supplies provided under these contracts totaled approximately \$3.8 million, approximately \$1.7 million for the 2001 solicitation and \$2.1 million for the 2002 solicitation. Id.; See Exh. DTE-2-1 (Att. C); DTE-2-2 (Att. B).

The results of the 2001 and 2002 solicitations in which Enemetrix participated were very positive. Mr. Foote testified that FG&E received a more robust response in September, 2001, with five bidders as compared to a total of three in the prior solicitations that it had conducted without Enermetrix. Tr. 6/11/03 at 29 (Foote). Two of the bidders were new bidders for FG&E's Default Service, and one of these new bidders was the successful supplier to FG&E. Id.; Tr. 6/11/103 at 139 (Foote). Also, for the first time, FG&E received class differentiated bids (residential and small C&I in one group, and large C&I in another group). Id. at 30. Lower prices for this solicitation had been expected due to wholesale market price movements, but the final results were at the low end of FG&E's expected range. Exh. FGE-3 at 6. The results indicated that the market was paying more attention to the FG&E default service load than in the past. Id. In the spring of 2002, the same process was used as for the fall 2001 solicitation, and FG&E received seven responses to its RFP, including one additional new bidder. Id. at 7.

FG&E had the lowest average Default Service rates in every class for the twelve month period, from December 2001 to November 2002. Exh. FGE-3, Sch. DKF-1. The projected savings to FG&E's Default Service customers for this twelve month period was approximately \$900,226 over the average cost for Default Service from all other Massachusetts utilities. Id. The average Massachusetts residential 500 kWh bill for the Default Service component during the period was \$31.33. FG&E's average residential 500 kWh bill was \$25.84 for the Default Service component, a savings of \$65.85 per customer for the twelve-month period, or 18%. Exh. FGE-3, Sch. DKF-1.

III. ARGUMENT

A. Enermetrix was not a Company Affiliated to FG&E within the Meaning of c. 164, §85 and 220 CMR 12.02

Enermetrix was not an affiliate of FG&E under either M.G.L. c. 164, §85 or 220 C.M.R. §12.02. Section 85 of chapter 164 provides three definitions of an "affiliate" of a company subject to the Department's jurisdiction, *e.g.*, FG&E. Based on Unital's 8.6% equity interest in Enermetrix in 2001 and 2002, Enermetrix was not an affiliate of FG&E under any one of the definitions, or under 220 CMR 12.02.

1. Under Subsections (a) and (b) of Section 85 Enermetrix Was Not Subject to the Substantial Control of Unital

Subsection (a) of §85 defines an "affiliate" as:

. . . [A]ny corporation, trust, association, partnership or individual

controlling a company subject to this chapter, either directly, by ownership of a majority of its voting stock or of such minority thereof as to give it substantial control of such company, or indirectly, by ownership of such a majority or minority of another corporation or association so controlling such company;

Subsection 85(a) is inapplicable because Enermetrix did not control FG&E either directly through ownership of FG&E stock, or indirectly by ownership of Unital stock.

Subsection (b) of §85 defines an "affiliate" as an entity:

- (b) so controlled by a corporation, society, trust, association, partnership or individual controlling as aforesaid [in §85(a)], directly or indirectly, a company subject to this chapter;

All of the other Unital subsidiaries, *e.g.*, Unital Energy Systems, Inc., URI, Unital Power Corp., are affiliates of FG&E under subpart (b) because they are 100% owned by Unital, which owns and controls FG&E. However, under this subsection, Enermetrix was *not* an affiliate of FG&E because Unital did not "so control" Enermetrix (*i.e.*, by majority stock ownership or by ownership of such a minority interest to amount to "substantial control" as defined in subsection

85(a)). As Mr. Brock testified, Unitil was a "non-controlling" minority investor in Enermetrix. Exh. FGE-1 at 7; Tr. 6/11/03 at 22 (Brock). There is no evidence on the record that refutes this testimony.

Unitil Corp. could not control, nor exert significant influence over, Enermetrix, as it was one of a large number of equity investors, held only one out of 10 Board seats, and had no extraordinary voting power. As such it had no ability to control Enermetrix within the meaning of the statute. Unitil never reached the threshold of holding substantial control over the policies of Enermetrix. Exh. FGE-1 at 10-11. As a practical matter, Enermetrix raised over \$60 million in four rounds of equity financing up to 2001, Series A, B, C and D. Tr. 6/11/03 at 18 (Brock). Although Unitil's initial \$3 million investment in 1999 in the Series B financing round was sufficient to gain Unitil two Board seats, Unitil's subsequent investments of \$1 million each in the Series C and Series D rounds paled in relation to the total of \$20 million raised in the Series C round and the \$35.5 million raised in the Series D round. Tr. 6/11/03 at 19-20 (Brock). By the time of the 2001 solicitation, when Unitil's interest had reduced to one Board seat, Enermetrix was clearly under the significant influence of the Series C and Series D equity holders and Unitil had minimal influence in the decision making at Enermetrix. Id. at 20-21.

The Company's outside auditors' application of the accounting rules provide additional support for Mr. Brock's testimony that Unitil did not have sufficient control over Enermetrix to confer affiliate status under §85(b). Specifically, *Opinions of the Accounting Principles Board No. 18* (New York: AICPA, 1971) par.17 "The Equity Method of Accounting for Investments in

Common Stock” (“APB 18”) provides that an investor that holds less than 20% ownership is presumed to have little or no influence over the investee corporation.³

Under APB 18, investors with less than 20% ownership and little or no influence record the investment at cost (or lower of cost or market, “LOCOM”), only record income if dividends are received, and record losses if the fair value of the investment drops below cost. Exh. FGE-1 at 8. Investors with less than 50% but more than 20% ownership are presumed to have significant influence and record the investment under the Equity Method in which the investor recognizes its proportionate share of the investee’s earnings and losses. Id.; Tr. 6/11/03 at 22-23 (Brock). Investors with over 50% ownership have a controlling interest and are required to consolidate the investee corporation as a subsidiary. Id. Unitil's and its external auditors, Grant Thornton LLP, have confirmed that under the "significant influence", test the Unitil’s investment in Enermetrix was appropriately accounted for under the LOCOM accounting rules of APB 18. Exh. FGE-1 at 9-10.

It is a principle of statutory construction that words of a statute be given their "plain meaning". Commonwealth v. Vickey, 381 Mass. 762, 767 (1980) (basic tenet of statutory construction is to give words their plain meaning in light of aim of legislature). The application of the "plain meaning" canon of construction is particularly important where the statute or regulation is understood to "elicit reliance by knowledgeable persons drafting documents in response to it". See Grady v. Comm'r of Revenue, 421 Mass. 374, 377 (1995) (tax statutes to be strictly construed in accordance with their plain meaning). The dictionary definition of "control" is "to exercise authoritative or dominating influence over; direct; to hold in restraint." THE

³ This standard is repeated in Financial Accounting Standards Board Interpretation No. 35 “Criteria for Applying the Equity Method of Accounting for Investments in Common Stock - an Interpretation of APB Opinion No. 18”, par. 6.

AMERICAN HERITAGE® DICTIONARY OF THE ENGLISH LANGUAGE, FOURTH EDITION; accord BLACK'S LAW DICTIONARY, 298 (6TH ED. 1990) "to exercise restraining or directing influence over. . . to regulate, restrain, dominate, curb, to hold from action, overpower, counteract, govern". There is no evidence that Unitil had any power to restrain, dominate or govern the activities of Enermetrix at any time, and particularly at the time of the 2001 and 2002 default service solicitations. Suggesting that an 8.68% percent interest constitutes control of Enermetrix is contrary to the plain meaning of control and the intent of G.L.L. c.164, §85.

In Re Bay State Gas Company, D.P.U. 92-68 (1993) the Department considered whether Mass Power was an affiliate of Bay State Gas Company under §85. Bay State had an indirect ownership of 17.5 percent in Mass Power. Based upon this percentage of interest, the Department did not find an "obvious controlling interest" in Mass Power under §85, but possibly "the appearance of an absence of equal bargaining power under G.L.C. §85(c)." If a 17.5 percent interest suggests only "an appearance of an absence of equal bargaining power", an interest of only 8.68 percent would not satisfy the definition of an "affiliate" under §85. In Re Boston Edison Company, D.P.U./D.T.E. 97-63 (Apr. 17, 1998), the Department rejected the DOER's position that even the smallest level of investment in a regulated utility should be sufficient to confer affiliate status under §85. The Department clarified that "control" or absence of bargaining power is the threshold for affiliates, and stated that a threshold based upon a *de minimis* interest would distort the meaning of the statute.

2. Under Subsection (c) of Section 85 There was Equal Bargaining Power between FG&E and Enermetrix

Subsection (c) of Section 85 provides a third definition of an "affiliate":

- (c) [an entity] standing in such a relation to a company subject to this chapter that there is an absence of equal bargaining power between the corporation, society, trust, association, partnership or

individual and the company so subject, in respect to their dealings and transactions.

There is no evidence that Enermetrix stood "in such a relation to" FG&E such that there was an "absence of equal bargaining power". An 8.68 percent interest would not rise to "an appearance of an absence of equal bargaining power" under §85(c). See Bay State Gas Company, D.P.U. 92-68 (1993). As Mr. Foote testified, Unitil's minority ownership interest in Enermetrix had no bearing upon FG&E's decision to use Enermetrix for its 2001 and 2002 default service solicitations. Tr. 6/11/03 at 123 (Foote). Unitil did not benefit financially from FG&E's arrangements with Enermetrix. Id. at 122. FG&E was not directed to engage Enermetrix by Mr. Schoenberger or any other Unitil or Usource employee. Id. at 134-135. In fact Usource's only involvement was in 2001, when a Usource employee participated in a conference call and introduced Mr. Foote to Jeff DeWeese, one of the Enermetrix principals. Id. at 123. Following the initial introductory telephone call, Mr. Foote and his staff dealt directly with Enermetrix. Usource did not represent FG&E or act on FG&E's behalf in the transactions with Enermetrix, and Usource had no further involvement and earned no fee from either Enermetrix or FG&E. Id. at 122-123.

To FG&E's knowledge, Enermetrix was the only internet auction site of its kind which provided the service FG&E required, i.e., acted as a broker between retail customers and suppliers for load-following service. Id. at 113-114. According to Mr. Foote, the only other internet brokers acting in the region at that time were Enron and Intercontinental Power Exchange, both of which ran wholesale power exchanges, which were not suitable for FG&E's needs. Id. at 112-113, 115. The fact that Unitil had a minority interest in Enermetrix was irrelevant to Mr. Foote's decision to use Enermetrix. Id.

In the two transactions in question, Enermetrix charged the default service suppliers its standard brokering fee, as shown in response to DTE-RR-2, confirmation that the transactions were at arms length. As Mr. Foote stated, the fee of 20-30 cents a megawatt hour was relatively low, in fact, it was below the level that usually makes a difference in wholesale power transactions. Tr. 6/11/03 at 116 (Foote). FG&E did not pay Enermetrix any consideration for the wholesale energy brokerage services provided in connection with procuring its default service supplies. Id.

3. Under 220 CMR 12.02 Enermetrix Was Not a Unit or Division of FG&E and Was Not Controlled by Unitil

Finally, an "affiliate" under the Department's regulations is defined as:

any "affiliated company" as defined in M.G.L. c. 164, § 85, or any unit or division within a Distribution company or its parent, or any separate legal entity, either owned or subject to common control of the Distribution company or its parent.

220 C.M.R. §12.02 (emphasis added). Enermetrix is not a "unit or division" of FG&E or "owned or subject to common control" of Unitil Corp. or FG&E. "Control" in 220 C.M.R. 12.02 should be interpreted consistent with the statutory language of §85, its authorizing statute, which defines control as "substantial". As discussed in detail in §III A.1, supra, less than a 9% equity interest is not "substantial" control.

B. FG&E Complied with the Requirements of §§85A and 94B Pertaining to Contracts with Affiliated Companies

G.L. c. 164 §85A requires that written contracts with affiliates be filed with the Department within 10 days of execution, or, if not in writing, a statement describing the terms of the contract must be filed. Section 94B requires preapproval by the Department of contracts with affiliates "covering a period in excess of one year".

For the reasons explained in §III(A) above, neither of these statutes is applicable because Enermetrix was not an affiliate of FG&E under G.L. c. 164, §85 or 220 CMR 12.02. Moreover, even if Enermetrix were an affiliate of FG&E, Section 94B is irrelevant because neither of FG&E's two wholesale energy brokering transactions with Enermetrix were for longer than 6 months, and the statute clearly applies to contracts "covering a period in excess of one year".

With respect to §85A, FG&E did notify the Department on October 31, 2001 and on April 9, 2002 that it had on each occasion used Enermetrix to procure its default service supplies. Tr. 6/11/03 at 35 (Foote); Exh. AG-1-1. While neither of these letters disclose Unitil's minority interest in Enermetrix, an earlier letter to the Department provided notice that Unitil had acquired an equity interest in Enermetrix' predecessor corporation, NAP. Exh. AG-1-1 (Att. 1); Tr. 6/11/03 at 38 (Foote). In addition, the record shows that Unitil notified the Department of its ownership interest in Enermetrix through informal meetings and telephone calls. Tr. 6/11/03 at 40-41 (Foote). Unitil's Annual Report and 10k also disclosed Unitil's minority interest in Enermetrix. AG-RR-1. Moreover, the Attorney General himself noted Unitil's investment in Enermetrix in filings with the Department in the Competitive Market Initiatives proceeding in June 2001, several months prior to FG&E's use of Enermetrix. Exh. AG 1-2. The Attorney General in his letter to the Department references the Enermetrix Exchange which, as he noted, matches customers and suppliers through a blind auction process. Exh. AG-1-2, Att. At 3 of 4. Specifically, the Attorney General states:

Unitil proposes that Usource, the company's energy brokerage business, function as a broker to bring FG&E customers to the Enermetrix exchange, an entity in which Unitil has a financial interest.

Id. It is disingenuous for the Attorney General to suggest two years later that FG&E failed to disclose Unitil's interest in Enermetrix when the information was publicly available, and

obviously known to the Attorney General, and the subject of a filing from his office to the Department.

FG&E does not suggest that the requirements of §85A would ordinarily be satisfied by the indirect or informal communications to the Department in the attachments to Exh. AG 1-1. However, it was FG&E's and Unifil's good faith interpretation of the applicable law that Enermetrix was not an affiliate of FG&E and that, therefore, no filings with the Department was required. Therefore, no violation of §85A should be found, particularly in light of the fact that the Department was on notice of the pertinent details of the relationship from a variety of sources since as early as 1999, at least two years before the transactions in question.

C. The Pricing of Enermetrix Services to FG&E Complied With The Requirements of 220 CMR §12.04

220 C.M.R. §12.04(3) provides: “An Affiliated Company may sell, lease or otherwise transfer an asset to Distribution Company, and may also provide services to a Distribution Company, provided that the price charged to the Distribution Company is no greater than the market value of the asset or service provided.”

The provisions of 12.04(3) are not implicated because Enermetrix was not an affiliate of FG&E, and because FG&E made no payments to Enermetrix. As Mr. Foote testified, the suppliers were responsible for paying the Enermetrix fee for the services provided by Enermetrix. Exh. FGE-3 at 5. FG&E was not involved in the contracting process, and had no payment responsibilities regarding any Enermetrix contract with the suppliers, although FG&E expected that the bid responses, would include the suppliers' estimate of the fee they would ultimately pay to Enermetrix. Id.

Moreover, even if §12.04(3) were applicable, FG&E's arrangement with Enermetrix was consistent with those rules because Enermetrix charged the suppliers according to its standard

brokering fees that it charged other suppliers using the Enermetrix Exchange. See DTE-RR-2. The reasonableness of the fees is apparent from the fact that the default service revenues represented by the contracts that FG&E signed with the successful bidders in the 2001 and 2002 solicitations approximated \$3.8 million. It is unreasonable to suggest that total transaction fees of \$19,000 for \$3.8 million of supplies do not reflect a market price. The service provided by Enermetrix resulted in FG&E having the lowest average Default Service rates of the Massachusetts distribution companies during the time covered by the two solicitations, confirming the competitive market results. Exh. FGE-3, Sch. DKF-1.

D. In procuring its Default Service Supply through Enermetrix, FG&E
Obtained a Market-Based Price in Compliance with the Department's
Directives in D.T.E. 99-60-A

The standards established in DTE 99-60-A provide: (1) Default service prices should be market-based, be procured through reasonable business practices, and take into account the costs of providing default service, consistent with the development of robust competitive retail markets; (2) costs associated with providing default service should be minimized; (3) customer confusion should be minimized; and (4) a general consistency in default service across distribution service territories should be achieved, to the extent such consistency is feasible and would benefit ratepayers.

FG&E determined in 2001 that it should be taking additional measures to comply with the Department's standards to ensure its customers were provided with market-based prices at minimal costs. See Exh. FGE-3 at 4-5; Tr. 6/11/03 at 136 (Foote). Because of the low participation rates in its previous auctions, FG&E sought to expand the market response to its default service RFP in order to attract a wider range of bidders and market-based prices. Id. Accordingly, FG&E retained Enermetrix to provide it with greater access to retail suppliers. Tr.

6/11/03 at 27-29 (Foote). The results of the Enermetrix transaction demonstrate compliance with the standards in DTE 99-60-A. Through Enermetrix' brokerage service, FG&E was able to access a wider range of retail and wholesale suppliers in New England than it had been able to in past RFPs. Exh. FGE-3 at 5. FG&E achieved a robust market response to its Default Service Supply Solicitations in October 2001 and April 2002.⁴ Id. The September, 2001 solicitation using Enermetrix produced more bidders than prior FG&E solicitations and extremely attractive prices. Id. at 6; Tr. 6/11/03 at 139 (Foote). For the first time, the Enermetrix solicitation produced group differentiated pricing, signaling to FG&E that the wholesale market was paying more attention to the FG&E load than in the past. Exh. FGE-3 at 6.

Throughout the process, Enermetrix communicated to FG&E any wholesale suppliers' concerns or questions and allowed FG&E to guide the process when necessary. Exh. FGE-3 at 5. The resulting default service price demonstrated reasonable business practices as required under the first prong of the Department's standard in DTE 99-60-A, because the price achieved by FG&E was among the lowest prices obtained during this period by comparable utilities. Exh. FGE-3, Sch. DKF-1.

Mr. Foote's testimony regarding the success of the Enermetrix solicitations over prior FG&E RFPs is uncontroverted. Schedule DKF-1 shows that FG&E had the lowest average default service rates in every class from December 2001 to November 2002. Exh. FGE-3, Sch. DKF-1. The evidence demonstrates that the projected savings to FG&E's default service customers for this twelve-month period was approximately \$900,226 over the average cost default service from all other Massachusetts utilities, resulting in a savings for the average residential customer of more than \$65.00 for the period. Id.

⁴ As part of its effort to expand its access to the supply market, FG&E did not limit bidders to suppliers which were members of the Enermetrix Exchange. Potential suppliers could utilize the Enermetrix Exchange or make their bids through Enermetrix brokers. See Tr. 6/11/03 at 103-104 (Foote).

E. No Penalties Should Be Imposed on FG&E for its Transactions with Enermetrix

No penalties should be assessed against FG&E for conducting wholesale energy supply business through Enermetrix. The statutory analysis and the evidence demonstrate that Enermetrix was not an affiliate of FG&E under G.L. c. 164, §85 when Enermetrix procured default service supplies for FG&E in 2001 and 2002. A contrary interpretation would distort the statute and would constitute an error of law.

Even if the Department determines that Enermetrix was an affiliate of FG&E under the applicable statutes and regulations, no penalties should be assessed because: (a) FG&E's interpretation of §85 that Enermetrix was not an affiliate was reasonable and made in good faith; (b) FG&E notified the Department about its transactions with Enermetrix; (c) FG&E made no payments to Enermetrix for its services; (d) the price FG&E achieved for default service by using Enermetrix was "market-based" procured through reasonable business practices; and (e) not only were ratepayers not harmed by the Enermetrix arrangement, ratepayers benefited from some of the lowest default service rates in the region.

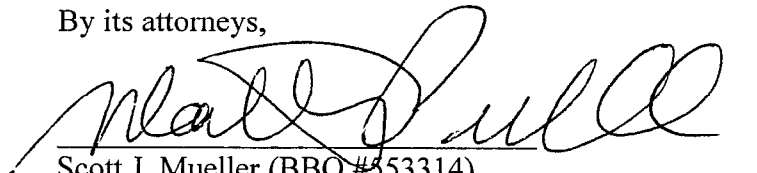
IV. CONCLUSION

Based upon the above-stated facts and analysis, FG&E respectfully requests that the Department find that FG&E was not an affiliate of Enermetrix in 2001 and 2002 under M.G.L. c.164 §85 and 220 CMR §12.02.

Respectfully submitted,

FITCHBURG GAS AND ELECTRIC
LIGHT COMPANY

By its attorneys,

A handwritten signature in black ink, appearing to read 'Scott J. Mueller', is written over a horizontal line.

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